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No. 94-1731

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

JOHN G. ROWLAND, GOVERNOR OF THE STATE OF CONNECTICUT, LINDA D'AMARIO ROSSI, COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES,

*Petitioners,*

vs.

JUAN F., ET. AL.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONERS' REPLY MEMORANDUM

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## REASONS FOR GRANTING THE WRIT[1]

As Petitioners have set forth in detail in their Petition for Writ of Certiorari, Supreme Court review of this case is necessary because the Second Circuit has rendered a decision in direct conflict with this Court's rulings in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) and *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), and with the ruling of the Sixth Circuit in *NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2998 (1993). The Respondents strive to obscure the clear legal conflicts inherent in the Second Circuit's ruling by relying upon immaterial facts and by asserting that obviously inapplicable cases in this Court and other circuits are consistent with the Second Circuit's holding. Their arguments, however, merely serve to highlight the need for review of this case. Nothing in the Respondents' brief alters the conclusion that review of the Second Circuit's ruling is essential in order to resolve the conflicts presented in this petition so as to preserve consent decrees as a viable option for settling institutional reform litigation.

### I. NOTHING IN RESPONDENTS' BRIEF ALTERS THE CONCLUSION THAT THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN DIRECT CONFLICT WITH THIS COURT'S RULING IN *FIREFIGHTERS LOCAL NO. 1784 V. STOTTS*, 467 U.S. 561 (1984).

The Respondents do not deny that, under *Stotts*, consent decrees, like contracts, must be construed within the four corners of the parties' agreement. They attempt to distinguish

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[1] The Petitioners reassert and incorporate herein all of the reasons for granting the writ set forth in their Petition for Writ of Certiorari. This reply brief is submitted in order to respond to specific points raised by the Respondents in their Brief in Opposition.

*Stotts* from the present case, however, by claiming that *Stotts* concerned the court's authority to "construe" a consent decree, whereas this case concerns the court's authority to "implement" a consent decree. According to the Respondents, courts are free to go outside the four corners of the parties' agreement as long as they are implementing and not construing the decree.

Significantly, the Respondents cite no legal authority that supports this claim.[2] Although the Respondents claim that the cases cited by the Petitioners comport with the Second Circuit's ruling, in fact those cases all applied the four corners rule set forth in *Stotts* and made no distinction between implementation and construction of a decree. Furthermore, with regard to the additional cases offered by the Respondents, *United States v. Knote*, 29 F.3d 1297 (8th Cir. 1994) also applied contract principles to construe a decree and *E.E.O.C. v. Local 580*, 925 F.2d 588 (2d. Cir. 1991) concerned the application of appropriate remedies after a finding of contempt. Neither case advances the Respondents' argument, and the latter case is wholly inapplicable given the lack of any finding of contempt in the present case. Finally, the language in *NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 2998 (1993), which the Respondents quote out of context, is a reference to the fact that a court may *modify* a decree beyond its four corners in the context of a defendant's request to do so, in order to effectuate its purpose. Given the Respondents' claim

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[2] It might appear from the way the Respondents have positioned the quotation marks in the quotation from the Second Circuit's decision, on page 5 of their brief, that the Second Circuit was relying on the authority of this Court in *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975), when it claimed that a court, in implementing a decree, is not rigidly confined to the terms contained within the four corners of the parties' agreement. A review of the Second Circuit's opinion, Pet. app. 10-A, and *ITT Continental Baking Co.* quickly reveals, however, that the Second Circuit cites *no* authority for the legal principle it asserts and, moreover, nothing in *ITT Continental Baking* supports the Second Circuit's position.

that the District Court's order was an implementation, not a modification, modification cases are clearly inapplicable.

In addition to the fact that there is no authority supporting the Second Circuit's distinction between implementing and construing a consent decree, to conclude that the District Court's order in this case was merely an "implementation" of existing contractual terms of the decree stretches the concept of implementation to an absurd extreme.[3] The consent decree at issue was carefully written to contain no hiring requirements or timetables other than the July 1, 1994 compliance deadline which, at the time of the District Court's order, was more than one year away. As the Respondents concede, the State agreed only to meet certain caseload ratios, thereby retaining the remedial flexibility so critical to an executive branch agency of government when grappling with issues that effect and are affected by the legislative branch's budgetary process. As the amici states point out, court imposed obligations of an executive branch agency can have tremendous financial and separation of powers implications for a state (Amici Curiae Brief at 10), and therefore DCF intentionally negotiated terms of a consent decree that would preserve its ability to achieve the goals of the decree through a variety of alternatives. Clearly, having flexibility in designing and implementing the means of achieving compliance with the decree was a critical part of the substance and scope of the decree, and it is the existence of this very flexibility that induced the State to enter the decree. By depriving the State of the ability to fashion its own method for achieving compliance, the court modified the very essence of

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[3] In an attempt to bolster their claim that the parties anticipated such intervention by the District Court, Respondents emphasize that the Decree provided for continuing jurisdiction by the District Court to ensure compliance. This provision has no added significance. A court ordinarily retains jurisdiction to ensure compliance with a consent decree whether or not the decree contains such a provision. *See* e.g. *Picon v. Morris*, 933 F.2d 660, 662-663 (8th Cir. 1991); *In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993).

the decree itself. To permit such a modification of the express terms of a consent decree based on the semantic distinction between "construing" and "implementing" that decree is to obliterate the fundamental principle set forth by this Court in *Stotts* and its progeny. A party that has waived its right to litigate the issues raised in a case, based on its negotiation of and reliance on the precise terms of an agreed upon consent decree, must have assurances that it cannot be forced to go beyond the terms and conditions upon which that waiver is based. Whether the District Court's order is characterized as a "construction," "implementation" or "modification," it is clear that the court fundamentally altered the terms and conditions of the decree. Respondents' argument establishes only one thing — the urgent need for a set of principles for guiding a court's review of a plaintiff's demand to alter the obligations of a governmental entity under a consent decree. *See also* Amici Curiae Brief at 2.

## II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION THAT CONFLICTS WITH AND UNDERMINES THIS COURT'S RULING *IN RUFO V. INMATES OF THE SUFFOLK COUNTY JAIL*, 502 U.S. 367 (1992), AND DIRECTLY CONFLICTS WITH A RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Respondents concede that the Second Circuit erred in applying the *Rufo* standards to the District Court's modification of the consent decree in this case because the holding in *Rufo* concerns the modification of a decree sought by a government defendant. Respondents' Brief at 9-10.[4] Nonetheless they

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[4] Importantly, Respondents' agreement that the Second Circuit has misapplied *Rufo* to this case further supports the need for this Court to clarify the scope of its decision in *Rufo* as it relates to a court ordered modification of an institutional reform consent decree.

contend, based on a distinct line of cases involving modifications of court imposed injunctive relief, that courts may modify a consent decree at the request of a plaintiff when "additional injunctive relief is necessary" to advance the purposes of the "injunction." Respondents' Brief at p. 10. This argument ignores the fundamental distinction between a consent decree and the order of injunctive relief following a court's consideration of the merits of the case, a distinction critical to this case.

Unlike a court ordered injunction, a consent decree is a negotiated agreement between the parties, in which the parties voluntarily waive their rights to litigate the merits of the underlying issues in order to resolve the litigation. An injunction, on the other hand, is a court order, based on a determination of the merits of the case or, in the case of a preliminary injunction, based on a determination of the plaintiff's likelihood of success on the merits of his claim. Obviously, such a court imposed remedy totally lacks the negotiated contractual attributes of a consent decree. It is clearly improper to conclude, based on a handful of cases upholding modification of injunctive relief,[5] that a consent decree may be unilaterally modified, over the State's objection, to *increase* the burdens on a State, without any regard for the State's plans to implement the decree without modification, and based solely on the court's speculative assessment that the State will fall short of 100% compliance one year in the future.

Moreover, the Respondents' argument that, following this Court's decision in *Rufo*, other courts have upheld such modifications, is equally misleading. *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994), cited by Respondents, involved consent decree modifications to which

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[5] It is significant to note that, unlike the present case in which the Petitioners were in compliance with the decree at the time of the District Court's order, the cases cited by the Respondents upholding modification of injunctive relief involve findings of contempt or similar violations of the court's order.

the defendants explicitly agreed. There is no question that a court is free to adopt modifications to which all parties consent. *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993) involved modifications of court ordered injunctive relief, which makes this case inapposite for the reasons previously discussed. Finally, the court's decision in *United States v. Western Electric Co., Inc.*, 46 F.3d 1198 (D.C. Cir. 1995) upheld a modification deemed necessary to *ease* the burden on a defendant of a consent decree in response to a change in circumstances that rendered the decree more onerous. Obviously, this case does not advance the Respondents' argument.[6]

Finally, the Respondents mischaracterize *Lorain*, suggesting that the Sixth Circuit would uphold a modification that burdens a defendant "if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties." Respondents' Brief at p. 11, *quoting Lorain*. Not only does the language quoted by the Respondents say nothing about increasing the burdens on a *defendant*, it explicitly relies upon a prior case in which the court approved modifications to *ease* the burden on a defendant. Indeed, the entire thrust and holding of *Lorain* is that a court may *not* modify an institutional consent decree to impose additional obligations on the state, over the state's objections and in the absence of an adjudicated or admitted violation of law. Thus, contrary to the Respondents' claims, the Second Circuit's ruling in this case is not consistent with any subsequent caselaw and directly conflicts with the Sixth Circuit's holding in *Lorain*.

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[6] Respondents' reliance on two other cases which predate *Rufo* is also misplaced. *Thompson v. Enomoto*, 915 F.2d 1383 (9th Cir. 1990), *cert. denied*, 502 U.S. 1071 (1992) upheld a modification to which the defendants had failed to file a timely legal objection or appeal, and *Williams v. Butz*, 843 F.2d 1335 (11th Cir.), *cert. denied*, 488 U.S. 956 (1988) concerned a modification requested by the government defendant to comply with changes in the law since the entry of the decree. Neither case would support the modifications advanced by the Respondents in the present case.

## CONCLUSION

In sum, Respondents have failed to reconcile the Second Circuit's holding with this Court's prior precedents. Failure to review this case, as illustrated by the numerous amici states joining the Petitioner's request for review, will seriously impede the ability of states across the nation to resolve institutional reform litigation on a cooperative basis. For all of the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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